United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7113

ORIGINAL

United States Court of Appeals

For the Second Circuit

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P/S

JAMES MARTIN, ANGELO LEONARDI, CARMINE LAVIA, RONALD DARIENZO, BRUCE DOAK and CARMINE APUZZO,

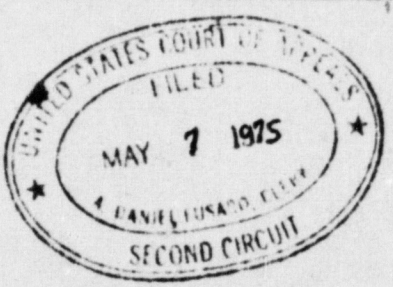
Plaintiffs-Appellants,

against

MARIO MEROLA, District Attorney, Bronx County, and individually, A.D.A. DWIGHT DARCY and A.D.A. STANLEY CHESLER,

Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES



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Docket No. 75-7113

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Preliminary Statement

Plaintiffs-appellants appeal from a decision of the United States District Court for the Southern District of New York (Breiant, J.) granting defendants-appellees' motion for summary judgment and dismissing the complaint. Plaintiffs-appellants filed notice of appeal, dated February 6, 1975, from the order dated January 23, 1975 and the judgment thereon entered on January 31, 1975.

Question Presented

Are the appellees civilly liable for a money judgment under 42 U.S.C. §1983 for alleged abusive treatment of the appellants during and following appellants' arrest and for disseminating allegedly prejudicial publicity concerning appellants prior to their trials?

Statement of Facts

A. State Proceedings

Appellants, along with other individuals, were indicted by the Grand Jury of Bronx County on July 19, 1974 (Nos. 1798/1974, 1801/1974, 1946/1974), July 31, 1974 (No. 1924/1974) and August 2, 1974 (No. 1944/1974) for the crimes of Conspiracy in the Third Degree (total of two counts), Conspiracy in the Fourth Degree (one count), Criminal Usury (total of forty-nine counts), Tampering with a Witness (one count) and Possession of a Weapon as a Felony (one count).

The indictments had been filed as sealed instruments and warrants issued for the arrest of the appellants. Members of the New York City Police Department arrested all the appellants (except for Bruce Doak) on August 7, 1974. Doak, who had been out of town, turned himself in and was arrested the following day, August 8, 1974. Each appellant was released either on parole or on bail bond. Appellant Carmine Apuzzo is now deceased.

Following the arrests, appellee Mario Merola, District Attorney of Bronx County, issued a press release announcing the arrests.

At all times material to this case, defendants were the District Attorney of Bronx County and two of his assistants (at the time in question one was an Assistant District Attorney, one had been a Criminal Law Investigator).*

B. Federal Proceedings

Copies of a summons and complaint, charging appellees with violating the constitutional rights of the appellants and praying for judgment for damages in the amount of $13,000,000, plus costs, was served upon appellees on October 17, 1974. By notice of motion and affidavit dated October 31, 1974, appellees moved for an order dismissing the complaint for failure to state a claim upon which relief can be granted, pursuant to Rule 12 (b)(6) of the Fed. R. Civ. P. Following oral argument before Judge Charles L. Breiant, Jr., the court treated the motion as having been made for summary judgment under Rule 56, and on January 23, 1975 granted summary judgment and dismissed the complaint. Judgment was filed on January 31, 1975.

Appellants filed notice of appeal, dated February 6, 1975.

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* Criminal Law Investigators (recent law school graduates who have not yet been notified of the results of the bar examination) appear of counsel to the District Attorney of Bronx County and perform the "duties, functions and responsibilities of attorneys and of Assistant District Attorneys" pursuant to orders of the Appellate Division, First Department, dated July 12, 1971 and June 4, 1974. A C.L.I. becomes an A.D.A. when he is admitted to the bar. Defendant Chesler was sworn in as an A.D.A. on February 11, 1975.

ARGUMENT

The motion was properly granted.

Appellants describe the issue presented by this appeal as the broad "question of whether there is to be any limitation on the actions of prosecutors and whether a claim based on actions transcending proper state prosecutorial prerogative is cognizable in federal courts" (Appellants' Brief at 8). No such sweeping question was presented to the court below, hence, the issue for this Court must, in our view, be presented much more narrowly. The District Court having granted defendants' motion to dismiss the claim, and treated it as a motion for summary judgment, the present inquiry should be confined to the question of whether the court below was correct in determining that defendants possessed judicial immunity (A 19)* and that there was no "deprivation of * * * rights, privileges, or immunities secured by the Constitution and laws" (A 21).

Plaintiffs-appellants made several claims in their complaint filed with the court below:

> (1) that plaintiff Carmine Apuzzo (now deceased), a diabetic suffering from terminal cancer, was arrested enroute to his doctor's office, then deprived of medical treatment and subjected to physical indignities until released on bail approximately 48 hours later,
>
> (2) that plaintiff Angelo Leonardi, a former heart patient, was not allowed to turn himself in or go to his own hospital and doctor, instead of Jacobi Hospital,

* References are to the Appendix.

where he was taken by the police following his arrest, then taken to jail where he was forced to remain without medical attention for 18 hours,

(3) that press releases and statements issued by defendants characterized plaintiffs as linked to Mafia crime families, thus prejudicing and defaming plaintiffs,

(4) that while executing search warrants defendants intruded upon plaintiffs' constitutionally protected zones of privacy,

(5) that defendants acted in an unprofessional manner so as to interfere with a fair trial, and

(6) that defendants acted with actual knowledge and beyond the scope and authority delegated them, and that by reason of these actions plaintiffs were denied their constitutional rights under the 4th, 5th, 6th, 8th, 13th and 14th Amendments to the Constitution of the United States.

Defendants' motion to dismiss the complaint was granted, and summary judgment granted, Judge Breiant noting that

> It is clear that Merola and his two assistant(s), movants here, were acting in their official capacity as prosecutors and clothed with judicial immunity from actions for money damages "based on non-malicious conduct in their official capacity" within their jurisdiction. *Palermo* v. *Rockefeller,* 323 F.Supp. 478, 485 (S.D.N.Y. 1971); *Pierson* v. *Ray,* 386 U.S. 547 (1967). No evidence of bad faith or actual malice on the part of

movants was shown, and the bare allegations of misconduct by "defendants" lumped together, are insufficient (A 19-A 20).

We submit that the court below correctly followed well-established rules of law, and that its decision should be affirmed.

We note that although Mario Merola was named a defendant in the caption of the action in the District Court, his name did not appear anywhere else in the text of the complaint or in the accompanying affidavit, save for his inclusion in the list of defendants in paragraph 4 of the affidavit. The same is true for Dwight Darcy and Stanley Chesler. No allegations were made which would have identified the particular actions of any of these defendants which would have resulted in deprivation of plaintiffs' constitutional rights and the complaint should properly have been dismissed for this reason alone [*United States ex rel. Tyrrell* v. *Speaker,* 471 F.2d 1197, 1204 (3rd Cir. 1973); *Hamilton* v. *Jamieson,* 355 F.Supp. 292, 294 (E.D. Pa. 1973)].

Appellants charge that the appellees committed acts which "shock the conscience" (Appellants' Brief at 8). While not admitting that any such shocking acts were in fact committed, we wish to point out that many of the alleged acts of which appellants complain were committed, if at all, by New York City Police, Department of Correction or court personnel. Since the doctrine of *respondeat superior* is not applicable in actions brought under 42 U.S.C. §1983, such portions of the complaint as alleged violations of plaintiffs' civil rights committed by persons other than the defendants were properly dismissed [*Pierson* v. *Ray,*

386 U.S. 547 (1967); *Seals* v. *Nicholl,* 378 F.Supp. 172, 176 (N.D. Ill. 1973)].

The court below properly considered the allegations in the complaint in a light favorable to the pleaders (A 16, A 20), and did not erroneously take judicial notice of facts not presented in the pleadings [*see Scheuer* v. *Rhodes,* 416 U.S. 232 (1974)]. Judge Breiant followed the rule "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff(s) can prove no set of facts in support of (their) claim which would entitle (them) to relief" [*Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957); *see Harris* v. *Kerner,* 404 U.S. 519, 520-521 (1972)]. The fact that defendants were not suable under the Civil Rights Act would warrant such dismissal [*Bramlet* v. *Wilson,* 495 F.2d 714 (8th Cir. 1974); *see Stambler* v. *Dillon,* 302 F.Supp. 1250 (S.D.N.Y. 1969)].

It is now well settled that a prosecutor who has acted in his official capacity in his dealings with the plaintiffs is "clothed with judicial immunity" [*United States ex rel. Moore* v. *Koelzer,* 457 F.2d 892, 894 (3d Cir. 1972)].* The

* *See* cases collected in footnote at 586, *Bauers* v. *Heisel,* 361 F.2d 581 (3rd Cir. 1966), *cert. denied,* 386 U.S. 1024 (1967); *see, e.g., Fidtler* v. *Rundle,* 497 F.2d 794 (3rd Cir. 1974); *Johnson* v. *Alldredge,* 488 F.2d 820, 827 (3rd Cir. 1973); *Madison* v. *Gerstein,* 440 F.2d 338 (5th Cir. 1971); *Dacey* v. *New York County Lawyers' Association,* 423 F.2d 188 (2nd Cir. 1969), *cert. denied,* 398 U.S. 929 (1970); *Fanale* v. *Sheehy,* 385 F.2d 866 (2nd Cir. 1967); *Clark* v. *State of Washington,* 366 F.2d 678 (9th Cir. 1966); *Gabbard* v. *Rose,* 359 F.2d 182 (6th Cir. 1966); *Scolnick* v. *Lefkowitz,* 329 F.2d 716 (2nd Cir. 1964); *Sires* v. *Cole,* 320 F.2d 877 (9th Cir. 1963); *Kenney* v. *Fox,* 232 F.2d 288 (6th Cir. 1956); *Jennings* v. *Nester,* 217 F.2d 153 (7th Cir. 1955), *cert. denied,* 349 U.S. 958 (1956); *Kremer* v. *Stewart,* 378 F.Supp. 1195, 1198 (E.D.Pa. 1974); *Lundblade* v. *Doyle,* 376 F.Supp. 57, 60 (N.D.Ill. 1974); *Fowler* v. *Vincent,* 366 F.Supp. 1224 (S.D.N.Y. 1973); *Boyd* v. *Huffman,* 342 F.Supp. 787 (D.Ohio 1972); *Palermo* v. *Rockefeller,* 323 F.Supp. 478 (S.D.N.Y. 1971).

ancient common law doctrine of judicial immunity was adopted by the United States Supreme Court in *Bradley* v. *Fisher,* 13 Wall. 335, 80 U.S. 335 (1871) [*see,* fn. 4, *Scheuer* v. *Rhodes, supra,* 416 U.S. at 239]. Although 42 U.S.C. §1983 makes liable "every person" who under color of law deprives another person of his civil rights, Sec. 1983 cannot be construed to be in derogation of common law immunities [*see, Bauers* v. *Heisel,* 361 F.2d 581 (3rd Cir. 1966), *cert. denied,* 386 U.S. 1024 (1967); *Lundblade* v. *Doyle,* 376 F.Supp. 57, 60 (N.D.Ill. 1974)]. Defendants' immunity to civil suits for money damages includes actions under the Civil Rights Act "based on non-malicious conduct in their official capacities and within [the defendants'] jurisdiction" [*Palermo* v. *Rockefeller,* 323 F.Supp. 478, 485 (S.D.N.Y. 1971); *see Pierson* v. *Ray, supra, Tenney* v. *Brandhove,* 341 U.S. 367 (1951)]. Even if defendants, through error, had acted in excess of their jurisdiction, they would not lose their immunity as they might if they had acted in the absence of jurisdiction [*Duba* v. *McIntyre,* 501 F.2d 590, 592 (8th Cir. 1974); *see Bradley* v. *Fisher, supra; Manning* v. *Ketcham,* 58 F.2d 948 (6th Cir. 1932); *Wade* v. *Bethesda Hospital,* 337 F.Supp. 671 (S.D. Ohio 1971); *cf. Jacobson* v. *Schaefer* 441 F.2d 127 (7th Cir. 1971)].

It is clear that prosecutorial immunity "is not an unlimited carte blanche granted prosecutors merely by virtue of their official position" (Appellants' Brief at 11). Immunity does not extend to acts essentially unrelated to the judicial process, *i.e.,* acts done in the prosecutor's investigatory role [*Guerro* v. *Mulhearn,* 498 F.2d 1249, 1256 (1st Cir. 1974)]. However, as recognized by the court below,

the acts plaintiffs complain of are directly related to the prosecutor's quasi-judicial functions. The "institution of proceedings for the arrest or search of persons suspected of criminal activties" has been recognized as a typical example of a situation where the doctrine of immunity applies [*Robichaud* v. *Ronan,* 351 F.2d 533, 537 (9th Cir. 1965)].

Addressing the question of the issuance of a press release that led to newspaper accounts of the arrest of the plaintiffs, we submit that the District Court properly rejected plaintiffs' contention that since "the acts complained of here are not committed by law to the authority of the District Attorney, the doctrine of immunity is not applicable" (Appellants' Brief at 14). As Judge Brieant recognized,

> The District Attorney has wide discretion in the conduct of criminal prosecution. * * * He is an important elected official of the County. His work is intimately connected with the public good; diligent performance of his duties are matters of vital public interest concerning which the public has a "right to know", and the media a legitimate interest in reporting, not only indictments and arrests, but their significance. * * * Apart from the right of the public to know, it would seem that the prosecutor should enjoy some right of free speech so as to permit him to account through the media to the voting public for the stewardship of his important public trust (A 20-A 21).

The Office of the District Attorney of Bronx County investigated plaintiffs and initiated their prosecution in the normal course of official duty. It is the duty of "the district attorney to conduct all prosecutions for crimes and offenses

cognizable by the courts of the county for which he shall have been elected * * *'' (N.Y. County Law §700 subd. 1). It is well established that inherent in the duty is a large element of discretion concerning whether to prosecute a particular case. The district attorney is presumed to act impartially [*People* v. *Fielding,* 158 N.Y. 542, 547 (1899)], and has great latitude in determining ''when, whether and how to prosecute'' [*People* v. *Krstovich,* 72 Misc.2d 90, 94 (Green Co. Ct. 1972), and cites cited therein]. In choosing to prosecute the cases for which plaintiffs were indicted, defendants demonstrated an ''actual and reasonable exercise of discretion'' [*Johnson* v. *Boldman,* 203 N.Y.S.2d 760, 762 (Sup. Ct. Sp. Term, Tioga Co. 1960)]. It is widely recognized that a prosecutor exercises a large element of discretion in investigating criminal matters and then formally prosecuting the case [*see* ABA Standards for Criminal Justice, The Prosecution Function, Approved Draft, 1971]. This factor of discretion, and the public policy consideration that a prosecutor should not be hindered in the exercise of that discretion by the threat of a lawsuit against him, forms the basis of the exception from liability under the Civil Rights Act [*see, e.g., Lundblade* v. *Doyle, supra,* 376 F.Supp. at 60].

The preceding discussion is intended to illustrate the framework within which a district attorney operates in the state of New York. We recognize that New York's statutory provisions regarding the authority of a district attorney are not the deciding factor in a federal court's determination of whether a state prosecutor's actions were among those that would receive immunity from a §1983 action. Indeed, it is immaterial that there is no state statu-

tory language concerning the authority of a district attorney to hold press conferences or to issue press releases. Such statutory authorization would not be binding upon the federal court's determination; the area of immunity protection of a prosecutor cannot be either limited or expanded by a state's statutory definition of his authority or responsibility. In this area federal law is of overriding importance [*Hampton* v. *City of Chicago, Cook County, Illinois*, 484 F.2d 602, 608 (7th Cir. 1973)]. However, since the question of the immunity of a prosecutor depends upon whether he was acting within his jurisdiction [*see, e.g., Pierson* v. *Ray, supra; Tenney* v. *Brandhove, supra; Bauers* v. *Heisel, supra; Palermo* v. *Rockefeller, supra*], the state laws establishing his jurisdiction are highly relevant to the determination of a federal court as to whether the prosecutor is immune to a suit under §1983.

The propriety of the press release issued by defendant Merola is not a proper consideration of a federal court hearing a civil rights complaint. Whether "excessive pretrial publicity proclaiming a defendant's guilt is a denial of due process of law" (Appellants' Brief at 10) should be a question for the state courts. Such a claim may be considered by the trial court* and might be raised in an appeal from a conviction. A federal court should not make a determination which would require ruling on the validity of a state criminal conviction during the pendency of the criminal process [*Guerro* v. *Mulhearn, supra,* 498 F.2d at 1252]. State criminal proceedings must be completed before a federal civil rights action for damages may be instituted [*Guerro* v. *Mulhearn, supra*].

*As this brief is being written, the case against plaintiffs in Bronx County Supreme Court has been marked "ready and passes" and is scheduled for trial on May 7, 1975.

The court below recognized that

> Disclosure of the criminal affiliations of the [Plaintiffs] with the various well known local "families" was, arguably, a failure to comply with the ABA Standards relating to the Administration of Criminal Justice, Fair Trial and Free Press * * * which do not appear to have the force of law in New York. Also there may have been a breach of Sec. DR 7-107 (B) (1) of the Code of Professional Responsibility adapted by the New York State Bar Association (Judiciary Law, McKinney's Supp. 1974). If so, this breach of prosecutorial responsibility does not amount to a "deprivation of * * * rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. Sec. 1983 (A 20-A 21).

The drafts of the American Bar Association's project on Standards for Criminal Justice are not law. "While [the] recommendations require thoughtful evaluation they are merely recommendations and are not constitutional holdings" [*Tunnell* v. *Wiley*, 369 F.Supp. 1260, 1267 (E.D. Pa. 1974)]. Here, plaintiffs have made no showing of the type suggested in *Tunnell* v. *Wiley, supra*, at 1269-1270, to establish any prejudice or deprivation of their right to a fair and impartial trial in their pending criminal case. Thus there is no need to resolve the question on balancing the right to a fair trial with the right to freedom of press or freedom of speech [*see Tunnell* v. *Wiley, supra*].

Since, as we have demonstrated, the Bronx County District Attorney and his assistants are immune from the suit brought in the court below, and dismissal of an action is proper where plaintiffs have failed to state a claim upon which relief can be granted because of the fact of defend-

ants' immunity, dismissal was the proper cause of an action for the court below [*Ponderendolph* v. *Derby Township*, 330 F.Supp. 1346 (W.D. Pa. 1971)].

Conclusion

The decision of the District Court should be affirmed.

Respectfully submitted,

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May, 1975

Service of 2 copies of the
within Brief is hereby
admitted this 7th day of
May 1975
Signed Stephen Peskin
Attorney for Plaintiffs-Appellants

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